In the Supreme Court

Appeal from the Michigan Court of Appeals
Before: Doctoroff, P.J., and Hoekstra and Markey, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee, S.C. No. 120036

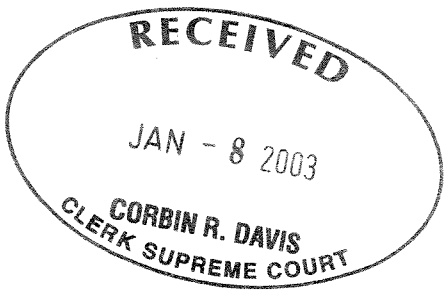
-vs- COA No. 225572

PRENTICE DEVELL WATKINS, Jackson CC No. 99-094247-FC

Defendant-Appellant,
_____/

APPELLANTS BRIEF ON APPEAL

"ORAL ARGUMENT REQUESTED"



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APPELLANT'S STATEMENT OF FACTS

(The numbers in parenthesis indicate the page of the appendix unless the context clearly indicates otherwise.)

Appellant believes that the following facts are relevant to the issues here raised.

1. On November 4, 1999, the Defendant pled guilty to the charge of OPEN MURDER, and Felony Firearm.

2. The factual basis for the guilty plea was "I had a gun, we fought, and Stewart was dead". Also, "I had a gun, a shot was fired and Stewart was dead." (page 6a)

3. The trial court did attempt to question the defendant further regarding the facts forming the basis of the plea, but his attorney objected. The following exchange occurred.

> THE COURT: At the time you has some words [with the victim]?
>
> THE DEFENDANT: Yes, your Honor.
>
> THE COURT: What did you say to him?
>
> MR. BRANDT [defense counsel]: Well, your Honor, I think as that point I have to stop the questioning. I think the Court has enough for the plea. We can continue this during the course of the hearing.
>
> THE COURT: Okay. We can. Of course, I'm going to ask him that then.
>
> MR. BRANDT: Absolutely. I fully understand that at the degree hearing. (7a)

4. On November 8, 1999, the trial court conducted "an examination of witnesses to determine the degree of the crime", pursuant to MCL 750.318: MSA

28.550

5. During that hearing substantial evidence was presented by the prosecution, much of it unobjected to hearsay, which strongly indicated that the killing involved here was committed during a robbery.

6. At the end of that hearing, after the prosecutor rested, the attorney for the Defendant rested without calling any witnesses. (page 10a).

7. At that point, without objection, and without any further advise to the Defendant of his right to remain silent, the trial Court called the Defendant to the stand to testify!!! (page 10a)

8. The trial court found the Defendant to be guilty of 1st Degree Murder (Felony Murder), MCL 750.316(B) and Felony Firearm, MCL 750.227B-A on November 17, 1999.

9. When giving its opinion, the trial court relied, in part, on the testimony of the Defendant at the degree hearing. (18a)

10. Subsequently, an Application for Leave to Appeal was filed in this case. An Affidavit was attached to that application which indicated, in part, that:

> "I was not informed that if I plea guilty that I would be giving up any right to remain silent at that hearing, and that I could be forced to testify against myself." (20a)

11. After a decision by the Court of Appeals on 7-24-2001, which affirmed the conviction, leave for appeal was sought by the Defendant.

12. On September 10, 2002, this Honorable Court granted leave to appeal limited to the following issues:

(1) Was defendant's testimony at the degree hearing compelled?

(2) Was the degree hearing pursuant to M.C.L. 750.318 a continuation of the plea hearing under MCR 6.302?
(3) Did defendant's guilty plea waive his Fifth Amendment right against compelled self-incrimination for purposes of the degree hearing?
(4) Was the alleged error in compelling defendant to testify a structural error?

APPELLANT'S ARGUMENT

(The numbers in parenthesis indicate the page of the appendix indicated unless the context clearly indicates otherwise.)

WAS DEFENDANT'S TESTIMONY AT THE DEGREE HEARING COMPELLED?

Defendant-Appellant: PRENTICE DEVELL WATKINS, says: YES

The Michigan Court of Appeals stated that the Defendant was compelled to testify by the trial court, but did not cite legal authority for this decision.

(Note: When the legal rationale of the Court of Appeals decision appears appropriate, (25a) it will be used with a (COA) notation.)

STANDARD OF REVIEW; It is believed that the Standard of Review on the issue of whether Defendant's testimony at the degree hearing was compelled is De Novo.

If it is construed as simply an issue of law, the review is de novo. US v Griffith, 17 F3d 865, 877 (CA6, 1994), cert den 513 US 850 (1994); People v Carpentier, 446 m 19, 60 n 19 (1994)

Or, if it is more properly construed as a mixed question of law and fact, which was not ruled upon by the trial court, and is not entitled to a presumption of correctness, it merits independent review, and should be reviewed de novo. Thompson v Keohane, 516 US 99; 116 SCt.457; 133 LEd2d 383 (1995).

The legal basis for the hearing at which the Defendant was called to testify was MCL 750.318; MSA 28.550, which provides in pertinent part:

> The jury before whom any person indicted for murder shall be tried shall, if they find such person guilty thereof, ascertain in their verdict, whether it be murder of the first or second degree; but, if such person shall be convicted by confession, the court shall proceed by examination of witnesses to determine the degree of the crime, and shall render judgment accordingly.

Both the United States and Michigan Constitutions prohibit the government from compelling a criminal defendant to testify against himself. US Const, Am V; Const 1963 ,art 1, sec 17; People v Cheatham, 453 Mich 1, 9; 551 NW2d 355 (1996). This right extends beyond the defendant's conviction and affords protection against compelled self-incrimination in the sentencing phase of a criminal proceeding. Estelle v Smith, 451 US 454, 462-463; 101 S Ct 1866; 68 L Ed 2d 359 (1981); People v Wright, 431 Mich 282, 295; 430 NW2d 133 (1988).

"The availability of the Fifth Amendment privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." Estelle, supra at 462, quoting In re Gault, 387 US 1, 49; 87 S Ct 1428; 18 Led 2d 527 (1967) (COA) (27a)

In the case of People v Manser, 172 Mich App 485, 432 NW2d 348 (1988) it was ruled that defendant's privilege against self incrimination was violated when he was required by the Court to answer various questions at a probation violation hearing after he had elected not to testify and had not otherwise waived the priviledge.

That is very similar to the case here. At the degree hearing the prosecutor had rested, and the defense decided not to present any witnesses. It was then that the

Court decided to call the defendant to the stand. (10a)

It is the contention of the Defendant herein that when a Court orders a defendant to take the stand, in a situation where his attorney does not object, few defendants will feel that they don't have to take the stand. The testimony was compelled.

The real question in this case is whether by his guilty plea he had waived his right against self incrimination by his plea. That is essentially the question to be resolved in the next two questions.

WAS THE DEGREE HEARING PURSUANT TO M.C.L. 750.318 A CONTINUATION OF THE PLEA HEARING UNDER MCR 6.302?

Defendant-Appellant: PRENTICE DEVELL WATKINS, says: NO

STANDARD OF REVIEW.

Whether this question is construed as simply an issue of law, or as a mixed question of law and fact, the standard of review should be de novo.

If it is construed as simply an issue of law, the review is de novo. US v Griffith, 17 F3d 865, 877 (CA6, 1994), cert den 513 US 850 (1994); People v Carpentier, 446 m 19, 60 n 19 (1994)

Or, if it is more properly construed as a mixed question of law and fact, it is not entitled to a presumption of correctness, it merits independent review, and should be reviewed de novo. Thompson v Keohane, 516 US 99; 116 SCt.457; 133 LEd2d 383 (1995).

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confession, the court shall proceed by examination of witnesses to determine the degree of the crime, and shall render judgment accordingly.

From that it is clear that the right to a trial by jury has been waived. It has been further determined that such a hearing is not a trial. People v Roberts, 211 Mich 187; 178 NW 690 (1920); People v Case, 7 Mich App 217, 225; 151 NW2d 375 (1967). However, there is no clear statement that it is part of the plea either. According to People v Berry, 198 Mich App 123, 497 N.W.2d 202 (1992), a case in which "the trial court did not establish by direct questioning of defendant 'the crime and the participation therein of the person pleading guilty'", the plea was allowed to stand. That is because "the analysis of a plea made pursuant to this procedure is different from the normal summary plea proceeding".

Now had the examination of witnesses taken place at the time of the plea, and the questioning of the defendant been fully conducted as he was originally entering the plea, we would not be facing this issue. People v Roberts, 211 Mich 187, 178 N.W. 690 (1920). But, once it is determined that a separate hearing is to be held during which testimony is to be taken, then an examination of the nature and purpose of the hearing should be made.

The hearing that was held pursuant to M.C.L. 750.318 in this case is very similar to that which occurred in Mitchell v United States, 526 US 314; 119 S Ct 1307; 143 L Ed 2d 424 (1999). In Mitchell the Defendant pled guilty to conspiracy to deliver cocaine but reserved the right to contest the amount during the sentencing phase of the proceedings.

In the case of Mr. Watkins, the Defendant herein, though he had pled guilty, he reserved the right to contest the Degree of the conviction.

In both cases, a major finding of fact had to occur, after the questioning of witnesses, before the Court could proceed on to the determination of the sentence in each case.

In Mitchell the district court had properly followed the plea procedure required by FR Crim P 11, which included the determination that the defendant understood that she was waiving her right to trial and her right to remain silent during trial.

In the case of Mr. Watkins, the defendant herein, the trial court had properly followed the plea procedure required by MCR 6.302(B) including the fact that he was waiving his right to trial and his right to remain silent during trial. (5a)

"Like the defendant in Mitchell, defendant's incrimination was not complete once the court accepted his plea of guilty to open murder and he was subject to further adverse consequences at the degree hearing. In fact defendant was in far greater jeopardy here than the defendant in Mitchell because his guilty plea did not conclusively determine his level of culpability for the crime and affected not only his punishment, but the nature of his conviction." (COA)(29a)

"The availability of the Fifth Amendment privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." Estelle, supra at 462, quoting In re Gault, 387 US 1, 49; 87 S Ct 1428; 18 Led 2d 527 (1967) (COA)(27a)

The fact that one is called a "degree hearing" and the other is called a "sentencing" does not seem to be a distinction with a difference. They both involve fact finding, during which witnesses must be called, and the exposure of the

defendant to different degrees of sanction by the State must be determined.

Therefore, when considering whether the degree hearing is a continuation of the plea hearing under MCR 6.302 for purposes of determining whether the right to remain silent is waived, the answer is NO.

DID DEFENDANT'S GUILTY PLEA WAIVE HIS FIFTH AMENDMENT RIGHT AGAINST COMPELLED SELF-INCRIMINATION FOR PURPOSES OF THE DEGREE HEARING?

Defendant-Appellant: PRENTICE DEVELL WATKINS, says: NO

The Michigan Court of Appeals says: NO

The trial court says: YES

STANDARD OF REVIEW.

Whether this question is construed as simply an issue of law, or as a mixed question of law and fact, the standard of review should be de novo.

If it is construed as simply an issue of law, the review is de novo. US v Griffith, 17 F3d 865, 877 (CA6, 1994), cert den 513 US 850 (1994); People v Carpentier, 446 m 19, 60 n 19 (1994)

Or, if it is more properly construed as a mixed question of law and fact, it is not entitled to a presumption of correctness, it merits independent review, and should be reviewed de novo. Thompson v Keohane, 516 US 99; 116 SCt.457; 133 LEd2d 383 (1995).

Despite the belief that this Honorable Court should review this issue de novo, Defendant-Appellant is impressed with the rationale of the Michigan Court of Appeals on this issue and adopts same as part of its argument.

It is clear from the simple reading of MCL 750.318; MSA 28.550 that "if such person shall be convicted by confession, the court shall proceed by examination of witnesses to determine the degree of the crime, and shall render judgment accordingly". From that it is clear that the right to a trial by jury has been waived. It has been further determined that such a hearing is not a trial. People v Roberts, 211 Mich 187; 178 NW 690 (1920); People v Case, 7 Mich App 217, 225; 151 NW2d 375 (1967). However, there is no clear statement that it is part of the plea either. According to People v Berry, 198 Mich App 123, 497 N.W.2d 202 (1992), a case in which "the trial court did not establish by direct questioning of defendant 'the crime and the participation therein of the person pleading guilty'", the plea was allowed to stand. That is because "the analysis of a plea made pursuant to this procedure is different from the normal summary plea proceeding".

The hearing that was held pursuant to M.C.L. 750.318 in this case is very similar to that which occurred in Mitchell v United States, 526 US 314; 119 S Ct 1307; 143 L Ed 2d 424 (1999). In Mitchell the Defendant pled guilty to conspiracy to deliver cocaine but reserved the right to contest the amount during the sentencing phase of the proceedings. During that phase of the proceedings, the defendant remained silent and the trial court held her silence against her, in that she did not counter the evidence against her.

In the case of Mr. Watkins, the Defendant herein, though he had pled guilty, he reserved the right to contest the Degree of the conviction.

In Mitchell the district court had properly followed the plea procedure required by FR Crim P 11, which included the determination that the defendant

understood that she was waiving her right to trial and her right to remain silent during trial.

In the case of Mr. Watkins, the defendant herein, the trial court had properly followed the plea procedure required by MCR 6.302(B) including the fact that he was waiving his right to trial and his right to remain silent during trial. (5a)

"Like the defendant in Mitchell, defendant's incrimination was not complete once the court accepted his plea of guilty to open murder and he was subject to further adverse consequences at the degree hearing. In fact defendant was in far greater jeopardy here than the defendant in Mitchell because his guilty plea did not conclusively determine his level of culpability for the crime and affected not only his punishment, but the nature of his conviction." (COA)(29-30a)

In Mitchell, supra at 322-323, the Supreme Court held that the plea colloquy did not entail a waiver of defendant's right to remain silent during sentencing.

> The purpose of a plea colloquy is to protect the defendant from an unintelligent or involuntary plea. The Government would turn this constitutional shield into a prosecutorial sword by having the defendant relinquish all rights against compelled self-incrimination upon entry of a guilty plea, including the right to remain silent at sentencing. There is no convincing reason why the narrow inquiry at the plea colloquy should entail such an extensive waiver of the privilege. [Id. At 322] (COA)(29a)

The Court found that the purpose of FR Crim P 11 is to inform the defendant what she is losing by her decision to forgo a trial, not to elicit a waiver of the privilege against self-incrimination for further proceedings. Id. at 324. The Court noted that incrimination is not complete once guilt is determined, and a defendant has a legitimate fear of adverse consequences from testifying at sentencing. Id. at 325-326. Relying on Estelle, supra, the Court held that compelling a defendant to testify against his will at a sentencing hearing clearly contravenes the Fifth Amendment. Mitchell, supra, at 326. The essence of this basic constitutional principle is 'the requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel

expedient of forcing it from his own lips.'" Id., quoting Estelle, supra, at 462. (COA)(29a)

"The availability of the Fifth Amendment privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." Estelle, supra at 462, quoting In re Gault, 387 US 1, 49; 87 S Ct 1428; 18 Led 2d 527 (1967) (COA)(27a)

The Defendant is aware that his attorney indicated to the court at the time of the plea, that it expected the trial court to question him at the degree hearing. (7a) The Defendant also notes that his attorney rested without putting him on the stand at that hearing. (10a) Presumably, he did so after consulting with his client. Thus, the Defendant would contend that he did everything necessary to assert his right to remain silent.

The Defendant would further note that it is and must be the decision of the client, not the attorney, whether to testify or remain silent, and when taking a plea, the trial court must, speaking to the Defendant, inform him that he has that right. MCR 603(B)

WAS THE ALLEGED ERROR IN COMPELLING DEFENDANT TO TESTIFY A STRUCTURAL ERROR?

Defendant-Appellant: PRENTICE DEVELL WATKINS, says: YES

The Michigan Court of Appeals says: NO

STANDARD OF REVIEW.

If it is construed as simply an issue of law, the review is de novo. US v Griffith, 17 F3d 865, 877 (CA6, 1994), cert den 513 US 850 (1994); People v Carpentier, 446 m 19, 60 n 19 (1994) Or, if it is more properly construed as a mixed

question of law and fact, it is not entitled to a presumption of correctness, it merits independent review, and should be reviewed de novo. Thompson v Keohane, 516 US 99; 116 SCt.457; 133 LEd2d 383 (1995).

The Supreme Court has recognized a limited class of fundamental constitutional errors that "defy analysis by 'harmless error' standards." Neder v United States, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) citing; Arizona v Fulminante, 499 U.S. 279, 309, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). Errors of this type are so intrinsically harmful as to require automatic reversal (*i.e.*, "affect substantial rights") without regard to their effect on the outcome. For all other constitutional errors, reviewing courts must apply a harmless-error analysis pursuant to Rule 52(a) of the Federal Rules of Criminal Procedure, and must disregard errors that are harmless "beyond a reasonable doubt."

In People v Duncan, 462 Mich 47, 51; 610 NW2d 551 (2000) this Honorable Court stated that a structural error is intrinsically harmful regardless of the effect on the outcome and denies a defendant basic protections without which a trial cannot reliably serve as a vehicle for determining guilt or innocence.

Structural errors have been found where there is (1) a complete denial of counsel, Gideon v Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); (2) a biased trial judge, Tumey v Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927); (3) discrimination in selection of grand jury, Vasquez v Hillery, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986); (4) denial of self-representation at trial; McKaskle v Wiggins, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984); (5) denial of public trial, Waller v Georgia, 467 U.S. 39, 104 S.Ct 2210, 81 L.Ed.2d 31 (1984);

(6) a defective reasonable doubt instruction, Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)

In this case the trial judge called the Defendant to the stand, thus violating his right against self incrimination. In Miranda v Arizona, 384 U.S. 436, 465, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) it was stated that "It is now axiomatic that the defendant's constitutional rights have been violated if his conviction is based, in whole or in part, on an involuntary confession, regardless of its truth or falsity. This is so even if there is ample evidence aside from the confession to support the conviction." (Emphasis added.)

The error in this case began at the time of the plea hearing when the judge, after having his inquiry of the defendant cut off by the Defendant's attorney, asserted that he would inquire of the defendant at the degree hearing.

> MR. BRANDT [defense counsel]: Well, your Honor, I think as that point I have to stop the questioning. I think the Court has enough for the plea. We can continue this during the course of the hearing.
>
> THE COURT: Okay. We can. Of course, I'm going to ask him that then.
>
> MR. BRANDT: Absolutely. I fully understand that at the degree hearing. (7a)

The error continued throughout the degree hearing in that the trial judge clearly expected to hear from the Defendant. It was with this expectation that the entire degree hearing was held. And, finally, when the defendant declined to take the stand, the Judge called him sua sponte. Then, Court was able, at the conclusion of the hearing, to set aside any reasonable doubts that it might have, in part, because

when the Defendant took the stand, he was unable explain the apparent facts that had been presented.

The Defendant's testimony played a major part in the thinking of the trial judge. It is not quantifiable. It was wrong. And, is "seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." People v Carines, 460 Mich 750 (1999)

RELIEF REQUESTED

The Defendant-Appellant, Prentis Devell Watkins, would respectfully request that this Honorable Court reverse the decision of the Court of Appeals, and remand this case to the trial court, to set aside the conviction, and for further proceedings as justice may require.

Respectfully submitted,

Donald R. Cook

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Defendant-Appellant.
_____/

PROOF OF SERVICE

DONALD R. COOK, being first duly sworn says that on the 8th day of January, 2003, he served a two true copies of the Defendant's Brief on Appeal and two copies of the Appendix on the Jackson County Prosecutor's Office and one true copy of Defendant's Brief on Appeal and one copy of the Appendix on the Attorney General at the addresses listed below, by first class mail, postage fully prepaid.

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